No. 93-464

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In the Supreme Court of the United States

OCTOBER TERM, 1993

G.K. DEVELOPMENT COMPANY, INC., PETITIONERS

v.

BROADMOOR PLACE INVESTMENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to a sale approved by the bankruptcy court is moot under 11 U.S.C. 363(m) because petitioner failed to obtain a stay of the sale to a good faith purchaser during the pendency of the appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-1 to 4-5) is reported at 994 F.2d 744. The orders of the district court (Pet. App. 5-1 to 5-2, 6-1 to 6-3) and the bankruptcy court (Pet. App. 7-1 to 7-4) are unreported. A related order of the district court (Pet. App. 8-1 to 8-2) and related orders and opinions of the bankruptcy court (Pet. App. 9-1 to 9-4, 10-1 to 10-2, 11-1 to 11-3, 12-1 to 12-2) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3-1 to 3-2) was entered on May 21, 1993. A petition for rehearing was denied on June 17, 1993. Pet. App. 1-1 to 1-2. The

petition for a writ of certiorari was filed on September 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the bankruptcy of respondent Broadmoor Place Investments, L.P. (Broadmoor), a partnership whose sole asset was an office building on which Blue Valley Federal Savings and Loan Association held a lien. The bankruptcy court approved a sale of the property to a party other than petitioner. The district court (Pet. App. 6-1 to 6-3) and the court of appeals (*id.* at 4-1 to 4-5) declined to invalidate the sale.

1. In October, 1989, Broadmoor filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. Broadmoor's sole asset was the Broadmoor Place office building in Mission, Kansas. During the summer of 1990, Broadmoor signed two separate agreements to sell the building, one to petitioner and one to Forrest L. Robinson. Because 11 U.S.C. 363 required bankruptcy court approval for any sale of the property, Broadmoor filed an application in the bankruptcy court on August 8, 1990, seeking approval of the agreement to sell the property to petitioner, but advising the court of the existence of the "back-up" agreement with Robinson. See Pet. App. 4-2 to 4-3, 7-2, 8-1 to 8-2, 9-1 to 9-2.

2. After a hearing, the bankruptcy court rejected the proposed sale to petitioner, but approved the proposed sale to Robinson, subject to a modification requiring Robinson to deposit $50,000 earnest money. Pet. App. 12-1 to 12-2. The court explained that although the Robinson agreement had a lower purchase price ($5.5 million, rather than the $5.7 million offered by petitioner), it had fewer contingencies and provided for a faster closing. *Id.* at 11-2, 12-2. Petitioner filed a motion for reconsider-

ation and a motion for a stay pending appeal, both of which the bankruptcy court denied. *Id.* at 10-1 to 10-2, 11-1 to 11-3.[1] In the absence of a stay, Robinson purchased the property on December 7, 1990. See *id.* at 4-3, 7-3, 8-2.

3. When petitioner appealed, Robinson and the RTC[2] argued that the appeal was moot, because the only relief petitioner sought was invalidation of the sale, and because 11 U.S.C. 363(m) provides that a decision of an appellate court overturning a bankruptcy court's authorization of a sale of property "does not affect the validity of a sale * * * under such authorization to an entity that purchased * * * such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale * * * were stayed pending appeal." The district court concluded that petitioner's "appeal will be deemed moot if Robinson is found to be a 'good faith purchaser,'" and remanded to the bankruptcy court for consideration of that question. Pet. App. 8-1 to 8-2.

4. On remand from the district court, the bankruptcy court concluded that Robinson was a good faith purchaser. Pet. App. 7-1 to 7-4. The court held that a "good faith purchaser" under Section 363(m) is one who purchases in "good faith" and "for value." Pet. App. 7-3. The court found that Robinson clearly purchased for value, delivering $5.5 million at the closing on December 7, 1990. *Ibid.* The court then explained that a purchaser was a good faith purchaser in the absence of "fraud, col-

[1] The bankruptcy court subsequently supplemented the opinion denying the motion for reconsideration. Pet. App. 9-1 to 9-4.

[2] In this brief, "RTC" refers to the Resolution Trust Corporation as receiver for Blue Valley Federal Savings and Loan Association.

lusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Ibid.* The court found no evidence of any such conduct, noting that the absence of collusion with the debtor was made particularly clear by the debtor's preference for the sale to petitioner over the sale to Robinson. *Ibid.*

5. The district court affirmed. Pet. App. 6-1 to 6-3. The court stated that the bankruptcy court's findings on the "good faith purchaser" question "were not clearly erroneous" and thus concluded that the appeal was moot "because no stay was entered and the property in question has been sold to a 'good faith purchaser.'" *Id.* at 6-2.[3]

6. The court of appeals affirmed. Pet. App. 4-1 to 4-5. The court first stated that petitioner had no standing to appeal, because it was "merely an unsuccessful bidder and not an 'aggrieved person' as is required [under Tenth Circuit precedent]." *Id.* at 4-4 n.2. In any event, the court explained, petitioner's appeal was meritless. The court rejected petitioner's argument that the bankruptcy court impermissibly participated in administration of the estate when it selected the contract with Robinson over the contract with petitioner, explaining that the court had "power to disapprove a proposed sale recommended by a trustee or debtor-in-possession if it has an awareness there is another proposal in hand which, from the estate's point of view, is better or more acceptable." *Id.* at 4-4.

The court also rejected petitioner's argument that Robinson was not a good faith purchaser because Robin-

[3] Petitioner filed two appeals from the bankruptcy court. A different judge in the United States District Court for the District of Kansas dismissed the second appeal in a brief order relying entirely on the order discussed in the text. Pet. App. 5-1 to 5-2.

son knew of petitioner's offer to purchase the property when Robinson submitted its offer; the court stated that petitioner's "proposal was a bid and not a contract," because it could not be binding on the debtor until the court approved it. Pet. App. 4-4. The court also noted that petitioner's argument that Robinson colluded with the debtor was "negated by the fact that [the debtor] proffered [petitioner's] bid as its first choice." *Id.* at 4-5. Finding "no basis to disturb the Bankruptcy Court's finding * * * that the Robinson transaction was in good faith and involved no fraud," the court affirmed the district court's order dismissing the appeal. *Ibid.*

ARGUMENT

Petitioner argues for a variety of reasons (Pet. 6-16) that the lower courts erred in not overturning the sale to Robinson. Whatever the merits of those arguments, they are not properly before the Court because petitioner offers no basis for overturning the court of appeals' alternative holding that petitioner had no standing to challenge the sale. Pet. App. 4-4 n.2.

The lower courts frequently have held that a third party, whose sole relation to a bankruptcy proceeding is that it bid to purchase property from a bankrupt estate, does not have standing to challenge a decision authorizing a sale to another party.[4] Those decisions rest on the

[4] See, *e.g.*, *Davis* v. *Seidler* (*In re HST Gathering Company*), 125 B.R. 466, 468 (W.D. Tex. 1991) (unsuccessful bidder's application for leave to appeal denied for lack of standing); *In re Planned Systems, Inc.*, 82 B.R. 919, 922 (Bankr. S.D. Ohio 1988) ("[N]ormally a frustrated bidder lacks standing to object to a sale of property."); *In re NEPSCO, Inc.*, 36 B.R. 25, 26-27 (Bankr. D. Me. 1983) (prospective bidder has no standing to object to bankruptcy sale); see also *Big Shanty Land Corporation* v. *Comer Properties, Inc.*, 61 B.R. 272, 277 (N.D. Ga. 1985) (bidder has no

premise that the provisions of the Bankruptcy Code requiring judicial approval of sales of property of the estate were enacted for the benefit of shareholders and creditors of the debtor, not for the benefit of third parties who wish to purchase assets from the estate. Because the lower court's ruling on that point is adequate by itself to support the judgment of the lower court, review by this Court would not alter the judgment of the court of appeals. The arguments presented in the petition are, in any event, without merit.

1. Petitioner's principal argument (Pet. 6-12) is that the court of appeals erroneously determined that the case is moot. That conclusion, however, follows directly from the language of the statute. The Bankruptcy Code provides that

> reversal or modification on appeal of an authorization * * * of a sale * * * of property does not affect the validity of a sale * * * under such authorization to an entity that purchased * * * such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale * * * were stayed pending appeal.

11 U.S.C. 363(m). The only action petitioner challenges is the bankruptcy court's authorization of the sale to Robinson. Because the sale pursuant to that authorization was not stayed pending appeal, the statute allows an appellate court's review of petitioner's challenge to the sale to have effect only if the purchaser did not purchase the property "in good faith."

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standing to appeal denial of motion for pre-confirmation sale of Chapter 11 debtor's only asset); *In re Rook Broadcasting, Inc.*, 154 B.R. 970, 974 (Bankr. D. Idaho 1993) (bidder has no standing to object to disclosure statement for plan).

Although petitioner argues (Pet. 9-12) that this Court should review the question whether Robinson was a good faith purchaser, it does not suggest that the courts of appeals have adopted different standards for resolving that question. Indeed, petitioner acknowledges (Pet. 10) that, like the court below, the lower courts generally "have adopted the traditional equitable principles of good faith purchaser that have been generally defined as one who buys in good faith, that is, free of any fraud, misconduct or collusion between the purchaser and other bidders or the debtor; for value; and without knowledge of any adverse claim." There is no need for this Court to review the bankruptcy court's reasonable application of the generally accepted standard in this case.

Petitioner also contends (Pet. 7-8) that there is a conflict in the courts of appeals about when appeals should be dismissed as moot under Section 363(m). It is plain, however, that none of the decisions on which petitioner relies are apposite. The Third Circuit's decision in *In re Abbotts Dairies, Inc.*, 788 F.2d 143, 147-150 (1986), held that an appeal was not moot because the bankruptcy court had not determined whether the purchase was made in good faith. In this case, of course, the bankruptcy court wrote a separate opinion resolving that question. Pet. App. 7-1 to 7-4. The decisions of the Fifth Circuit in *Sullivan Central Plaza, I, Ltd.* v. *BancBoston Real Estate Capital Corporation* (*In re Sullivan Central Plaza, I, Ltd.*), 914 F.2d 731, 734 (1990), and the Ninth Circuit in *Mann* v. *Alexander Dawson Inc.* (*In re Mann*), 907 F.2d 923, 926 (1990), merely state that Section 363(m) does not apply when an alternate means of recovering the property is available under state law. Those statements are not relevant here, where peti-

tioner has not relied on a state-law basis for recovery.[5] The Seventh Circuit's decision in *In re EDC Holding Company*, 676 F.2d 945, 947-948 (1982) (interpreting an analogous provision in 11 U.S.C. 364 that protects entities that extend credit to a debtor upon authorization of a bankruptcy court), holds that a party has a right to review of the bankruptcy court's findings on the question of good faith; petitioner received such review in this case, but the bankruptcy court's findings were affirmed. Finally, the Seventh Circuit's decision in *Bastian* v. *Lakefront Realty Corporation*, 581 F.2d 685 (1978), did not arise out of a bankruptcy proceeding and thus did not consider Section 363(m).

2. Petitioner presents three additional contentions: that the bankruptcy court improperly intruded into administration of the estate when it approved Robinson's bid rather than petitioner's (Pet. 12-14); that the bankruptcy court deprived petitioner of due process by giving inadequate notice of the hearing that resulted in the decision to approve Robinson's offer to purchase the property (Pet. 14-15); and that it was improper for the bankruptcy court to issue a supplemental opinion explaining its denial of petitioner's motion for reconsideration (Pet. 15-16). None of those contentions provides a basis for reversing the judgment of the court of appeals, which rests on the separate holdings that the appeal was

[5] Petitioner's argument (Pet. 9-12) that Robinson was not a good faith purchaser under Kansas law rests on the incorrect premise that petitioner had a binding contract to purchase the property. Because petitioner's agreement with the debtor was never approved by the bankruptcy court, it never ripened into a binding contract. Moreover, the argument does not suggest that the sale to Robinson under order of the bankruptcy court violated Kansas law or that Kansas law grants petitioner a separate right to recover the property from Robinson.

moot because of 11 U.S.C. 363(m) and that petitioner had no standing to challenge the sale. Accordingly, none of those contentions warrants review by this Court. In any event, the contentions are meritless.

a. Petitioner's argument (Pet. 12-14) that the bankruptcy court improperly intruded into administration of the estate rests on the premise that the debtor presented the court with competing offers and asked the court to choose between them. But as the court of appeals explained, that is not at all what transpired. Instead, the debtor filed an application asking the bankruptcy court to approve a sale to petitioner. The court, however, for reasons explained in its opinion (Pet. App. 12-2), rejected the proposed sale to petitioner. Because it was aware of another proposed disposition of the property—a sale to Robinson—it was entirely appropriate for the court to proceed to consider that disposition at the same hearing, while all the parties and their counsel were present.

b. Petitioner's argument (Pet. 14-15) that the bankruptcy court's notice of its September 10, 1990, hearing was so defective as to deprive petitioner of due process is specious. The notice was actually delivered to petitioner, and petitioner appeared with counsel at the hearing. Furthermore, the notice made it clear to petitioner that the purpose of the hearing was to consider the propriety of a sale to petitioner, as well as an alternative proposed sale to Robinson. As the bankruptcy court explained, the notice "gave the interested parties one month to prepare for the hearing." Pet. App. 9-4. The fact that petitioner "chose to wait until three days before the hearing to retain counsel" may have limited petitioner's preparation for the hearing, *ibid.*, but it does not establish a violation of the Due Process Clause.

Petitioner also suggests (Pet. 14) that the notice violated Bankruptcy Rule 2002(c)(1) because it did not disclose certain financial transactions of a partner of Robinson. Petitioner does not explain, however, why those transactions would have been relevant to the bankruptcy court's decision, which was concerned only with making the most profitable deal for the estate. In any event, the notice fully complied with Rule 2002(c)(1) (set out at Pet. App. 13-2), which requires only that the notice include "the terms and conditions of any private sale and the time fixed for filing objections." The matters about which petitioner complains were neither "terms" nor "conditions" of the sale.

c. Finally, petitioner argues (Pet. 15-16) that the bankruptcy court did not have the authority to issue a supplemental opinion explaining its denial of petitioner's motion for reconsideration of the order approving a sale of the property to Robinson.[6] It is difficult to see, however, how the bankruptcy court's order on the motion for reconsideration is relevant to the case as it now stands. Petitioner is challenging the bankruptcy court's decision to approve the sale to Robinson; there is no reason to believe that the reiteration of the bankruptcy court's views in its supplemental opinion had the slightest effect on the review by the district court and the court of appeals of the bankruptcy court's original order.[7]

In any event, the bankruptcy court's decision to supplement its original explanation of why it denied petitioner's motion for reconsideration was entirely proper. This is not a case where a court attempted to alter an

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[6] The original opinion appears at Pet. App. 11-1 to 11-3. The supplemental opinion appears at Pet. App. 9-1 to 9-4.

[7] None of the opinions of the district court or the court of appeals refers to the supplemental opinion.

order that already had been appealed to an appellate court. Rather, the bankruptcy court simply issued a more detailed explanation of its earlier decision for the purpose of aiding appellate review of that decision. None of the cases cited by petitioner casts doubt on the validity of that practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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